FILE COPY

IN THE

Supreme Court of the United States

October Term, 1958

No. 591

ANTHONY M. GRIECO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY A. LOWENBERG
Attorney for Petitioner
51 Chambers Street
New York 7, N. Y.

Of Counsel:

ROBERT MITCHELL
51 Chambers Street
New York 7, N. Y.

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2913

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Statutory Provisions Involved	4
Concise Statement of the Case	4
Basis for Federal Jurisdiction in the Court of First Instance	8
Reasons Relied on for the Allowance of the Writ of Certiorari	9
Conclusion	12
Exhibit A—Memorandum of District Court	13
Exhibit B—Opinion of the United States Court of Appeals	19

AUTHORITIES CITED

Cases

Clark v. U. S., 289 U. S. 1 (1933)	9, 11
McDonald v. Pless, 238 U. S. 234 (1915)	9
Maftox v. U. S., 146 U. S. 140 (1892)	9, 11
United States v. Reid, 12 How. 361	9, 10

Statutes

Title 18 U.S.C. Sec. 371	3, 4, 8
Title 18 U.S.C. Sec. 1709	3, 4, 8

IN THE

Supreme Court of the United States

October Term, 1958

No.

ANTHONY M. GRIECO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Anthony M. Grieco, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 18th day of November, 1958.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 259 Fed. 2d —. A copy of this opinion is hereto annexed and marked Exhibit "B".

The memorandum of Levet, *D.J.*, denying the motion for a new trial is marked Exhibit "A" and annexed hereto.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 18th day of November, 1958.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit, nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1), on the grounds that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit. Certiorari is sought on the grounds that the United States Circuit Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in a way in conflict with an applicable decision of this Court and that the United States Court of Appeals for the Second Circuit has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Questions Presented for Review

The Petitioner, Anthony M. Grieco, was convicted in the United States District Court for the Southern District of New York on Counts 1 to 9 of an indictment charging him with embezzlement of mail and conspiracy to embezzle mail (Title 18 United States Code, Sections 371 and 1709), on April 30, 1958. The jury, after giving their verdict, were not polled and were discharged. Sentence was set for May 14, 1958. On May 5th, 1958, the Court received a letter from a juror in which she stated that she had wished to vote for acquittal, but being the only juror who did, another juror, a man, was very abusive to her for holding everyone up, to the point where he made her nervous, her heart pounded, she shook and was crying and became so confused that she finally apparently said guilty at a time when she was in no condition to render such an important decision. On May 8, 1958, the contents of the letter were conveyed to counsel and the petitioner. The petitioner then moved for a new trial. Judge Levet conducted a hearing at which both parties attended and he examined the juror, refused to allow the petitioner's attorney to examine her, and denied the motion for a new trial. The petitioner was sentenced to 18 months imprisonment. The questions presented for review with regard to the denial of a motion for a new trial are:

1. Did the evidence received concerning irregularity in the jury room require that, in the interest of justice, a new trial be granted?

2. Did the Trial Court err in refusing to recall the entire jury for a proper and complete inquiry into the facts and circumstances of irregularities leading to the verdict?

3. Did the Trial Court err and abuse its discretion: in denying the defendant's request to orally examine the juror; and/or in refusing to propound questions to said juror as submitted by defendant; and also by directing that no contact be made with the juror?

Statutory Provisions Involved

Title 18 United States Code, Sections 371 and 1709.

(These sections are not printed in this petition as no legal question has been raised as to either section.)

Concise Statement of the Case

This petition seeks to review a judgment of the United States Court of Appeals for the Second Circuit, dated and entered the 18th day of November, 1958 which affirmed an order of Judge Levet of the Southern District of New York, dated May 21, 1958 denying a motion for a new trial. The motion was based upon a letter of a juror written five days after a jury verdict to the Judge alleging irregularities in the jury room.

On April 28, 1958, the defendant, Anthony M. Grieco, was brought to trial upon indictment C 154-278, which charged eight counts of embezzlement of mail and one count of conspiracy to embezzle mail, in violation of Title 18, U. S. C., Sections 371 and 1709. On April 30, 1958, after three days of trial and prolonged deliberation by the jury, the jury foreman announced a verdict of guilty to all counts of the indictment. The defendant did not request a poll of the jury. Sentence was set for May 15, 1958.

Prior to the date set for sentence, and on May 8, 1958, the Court summoned counsel for the Government and the defendant together with his counsel, and introduced as Court's Exhibit No. 4, a letter received on May 5, 1958, from juror number 11, who participated in the aforementioned trial, which read as follows:

"Honorable Judge Levett
United States District Court
Foley Square, New York City

Dear Sir:

My name is Mrs. Jean Curl, juror number eleven, in the Case of the United States vs. Mr. Grieco. This case was held in your court Monday April 28 to Wednesday April 30.

I urgently need your advise because I haven't had any rest or peace of mind since last Wednesday.

While in the jury room one juror was very abusive to me because I was the only one to find Mr. Grieco not guilty and holding everyone up. He got me so nervous that my heart was pounding. I was shaking and crying and so confused that I finally said guilty. I want to retract that because I don't feel that I was in any condition at that point to render such an important decision affecting this man's future.

Kindly advise me what to do.

Respectfully yours,

Jean Curl

Mrs. Jean Curl
1314 Riverside Drive
New York 33, N. Y."

On the suggestion of the U. S. Attorney, Judge Levet then directed that no contact whatever be made with this juror

unless the Court should decide that it should become necessary. May 15, 1958, was then set for receipt of any motions based upon the letter now in evidence.

On May 15, 1958, the defendant made a motion requesting the following relief:

> 1. To set aside the verdict and to grant a new trial upon indictment C 154-278, on the grounds that the defendant had been substantially prejudiced by intimidation, duress and abuse exercised upon a juror in the deliberation, and upon the additional ground that he was denied his right to unanimous agreement of jurors in the said finding of guilty.
>
> 2. As an alternative to the foregoing, the defendant requested that the Court re-convene the jury, for the purpose of taking testimony regarding the allegations of the letter in evidence, and making a full inquiry into the circumstances to determine to what extent the defendant may have been prejudiced by misconduct of and within the jury.

Oral arguments were heard on May 15, 1958, and the Court reserved decision, again directing, over objection of counsel for the defendant, that no contact be made with the jury, other than that which the Court might decide should become necessary.

The motion for a new trial or to re-convene the jury, as applicable to indictment C 154-278 was denied on May 22, 1958. See Exhibit "A".

Counsel for the defendant, upon his inquiry of the Court, was again instructed that in the opinion of the Court, no contact with juror was necessary and therefore directed that none be made.

A notice of appeal was promptly filed on May 27, 1958. On May 28, 1958, counsel for both sides were summoned into chambers where the Court suggested that counsel for the defendant move for reargument of the motion denied on May 22, 1958, and the Court would then be favorably disposed to summoning juror number 11 for purposes of making a limited inquiry into the alleged irregularities in the jury deliberations, such inquiry to be conducted by the Court only. Upon the objection of counsel for the defendant to any such proceeding wherein direct questioning of the juror could not be had, or where the entire jury would not be called for the purpose of a full inquiry, the Court set June 2, 1958, as a date for reargument of the motion previously denied, and directed the appearance of juror number 11.

On June 2, 1958, over the renewed objections of counsel for the defendant as to the method of questioning and the general proceedings wherein only one juror rather than the entire jury was to be called, the Court proceeded to take testimony of juror number 11.

Juror number 11, a married female about 43 years of age, testified that she had been unable to participate or take part in the discussions and deliberations leading to the finding because of a second juror who had shouted and yelled the entire time, in a very loud and mean tone of voice, and particularly when she had tried to express herself. She stated that the offending juror would not let her talk for the entire three hours of deliberation. According to this juror's testimony, she became so nervous, she had chills, was sick and upset. When asked by the Court if she had heard the clerk ask the jurors when they came into the courtroom what the verdict was, she testified that she

didn't know what she heard, that she was in a daze and that she didn't even remember what the man sitting next to her was saying.

No attempt was made by the Court to determine subjectively whether juror 11 was placed in fear by this irregular conduct, or what effect if any, the yelling and pounding had upon the other jurors, or the possible motive of the offensive juror or his possible concealment of mental disturbances or substantial prejudice upon *voir dire* examination.

Subsequent to examination by the Court, counsel for the defendant again requested permission to examine this juror personally, and after denial thereof, requested an adjournment of two days in order to properly study the testimony heard and to prepare written questions for the Court to propound to said juror. A ten minute recess was then granted and 13 questions were submitted for the Court to propound to the juror. Of the 13 questions submitted (Deft.'s Ex. #1), the Court declined to propound the 9 questions bearing on the issue.

Judge Levet thereupon denied the motion for reargument and stated he adhered to his original decision.

Basis for Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crime charged was embezzlement of mail matter and conspiracy to embezzle mail in violation of Title 18, U. S. C., Sections 371 and 1709.

Reasons Relied On for the Allowance of the Writ of Certiorari

The basis of this application is that the United States Court of Appeals for the Second Circuit by its judgment of affirmance dated the 18th day of November, 1958, which affirmed the judgment of conviction of the Petitioner rendered by the United States District Court for the Southern District of New York on the 27th day of May, 1958, decided an important question of Federal Law in a way in conflict with an applicable decision of this Court and has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The particular decisions of this Court that it is claimed the opinion and decision of the United States Court of Appeals for the Second Circuit are in conflict with are *U. S.* v. *Reid*, 12 How. 361, *Mattox* v. *U. S.*, 146 U. S. 140, *McDonald* v. *Pless*, 238 U. S. 234 and *Clark* v. *U. S.*, 289 U. S. 1.

In all these cases this Court expressed the opinion in regard to the refusal of Courts to inquire in any way whatever as to what had occurred during the jury's deliberations, that when the question arises in the future, the testimony of the jurors may be held competent and that we shall no longer hear that they may not "impeach their verdict" when it is "impeachable" if what they say is true.

In the present case the limited testimony of the juror indicates that the verdict of the jury in the trial court was not the unanimous conclusion of the twelve triers of the facts. The trial judge elicited from the juror, in a hearing

in which defense counsel was refused the right to ask oral questions, and given only ten minutes to prepare written questions to be asked of the juror whose testimony he could not anticipate, that the juror was not permitted to talk in the jury room, was "yelled at," insulted and did not even hear the arguments of other jurors at the end and never was permitted to say all she desired to say, had chills, her heart pounded, she trembled, cried and became so confused that she acquiesced in a verdict of guilty when her desire and previous opinion indicated an intent to vote not guilty. Then the trial judge repeated the consecrated rubric which has so confused the subject of jurors' disclosures, since it offered an easy escape from an embarrassing choice, and denied defendant's motion for a new trial.

Since the juror had previously been employed in night-clubs and choruses she would have been less prone to collapse in the manner indicated, since she was accustomed to appearing in public. She must have been placed under such stress that a complete inquiry of what occurred in the jury room would be the only way to satisfy the interests of justice.

Mr. Justice Taney said in *U. S.* v. *Reid, supra*:

> "The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdicts ought to be received. It would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought to always be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. . . ."

This was referred to in *Mattox* v. *U. S.*, *supra*, when the Court said:

> "The opinion thus indicates that public policy forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while at the same time, the necessity of great caution in the use of such evidence is enforced."

The same idea was expressed in *Clark* v. *U. S.*, *supra*, which expressed the idea that:

> "Nor is there anything in our decision at variance with the rule, which is not without exceptions that the testimony of a juror is not admissible for the impeachment of his verdict."

All these cases recognize that there are exceptions to the rule of non-disclosure and the facts in the present case are clearly an exception to the rule.

The trial judge having heard the testimony of the juror, it was his duty to inquire of the other jurors to determine the exact facts with respect to the alleged irregularity in the jury room. This duty was self-evident since he had precluded petitioner's attorney from making any inquiry whatsoever. Unless this irregularity was fully explored there would be no way for an Appellate Court to determine whether there was sufficient basis for the trial judge to form his opinion and whether such an opinion was legally correct.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioner
51 Chambers Street
New York 7, N. Y.

Of Counsel:

ROBERT MITCHELL
51 Chambers Street
New York 7, N. Y.

Exhibit A

Memorandum of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#24344

UNITED STATES OF AMERICA,

AGAINST

ANTHONY M. GRIECO,

Defendant.

LEVET, D. J.

The defendant, Anthony M. Grieco, was indicted and convicted after trial by jury of charges of embezzlement of mail and conspiracy to embezzle mail (Title 18 United States Code Annotated, § 1709; Title 18 United States Code Annotated, § 371). This guilty verdict, rendered on April 30, 1958, covered nine counts. Following the foreman's report, the clerk asked the jury if they all so found and the jury answered in the affirmative. The attorney for the defendant stated in effect that no poll was requested and the jury were discharged. No other motion was made at that time with respect to the verdict. There was ample evidence to sustain a guilty verdict.

Subsequently, and after a plea of guilty to another indictment in this court (No. C 154-324), sentence herein

was set for May 14, 1958. On May 5, 1958, the court received a letter from one of the jurors. On (24) May 8, 1958, after summoning counsel and the defendant, the court informed counsel of the letter so received and supplied a copy to each attorney. The essential part of this letter reads:

> "While in the jury room one juror was very abusive to me because I was the only one to find Mr. Grieco not guilty and holding everyone up. He got me so nervous that my heart was pounding—I was shaking and crying and so confused that I finally said guilty. I want to retract that because I don't feel that I was in any condition at that point to render such an important decision affecting this man's future."

Thereafter, defendant Grieco moved to set aside the verdict of guilty and sought an order for a new trial upon the alleged ground that he was "substantially prejudiced by intimidation, duress and abuse exercised upon a juror in the deliberation leading to the said verdict," and on the additional ground that he was "denied his right to unanimous agreement of jurors in the said finding of guilty."

The protection of a juror's subjective freedom of expression in consultation must be assured. The deliberations, motives and discussion of a jury leading to the rendition of a verdict normally are not subject to inquiry. Any other practice by which a court permitted a party to examine one or more jurors with respect to how they arrived at the verdict or what conversation and arguments

among them took place would jeopardize all verdicts and result in a never-ending attempt to upset determinations. See Wigmore on Evidence, 3rd Ed., Vol. VIII, pp. 663-668.

(25) As Wigmore states:

> "* * * The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow * * *." (Wigmore on Evidence, 3rd Ed., Vol. VIII, § 2349, at p. 668)

There are exceptions which include the following:

(1) Justifiable contempt proceedings based, for example, upon concealment or mis-statements of a juror on the voir dire. See Clark v. United States, 289 U. S. 1 (1933);

(2) Factual conditions resulting from extraneous influences upon the jurors while in deliberation, for example, when a certain newspaper publication about the case under deliberation was brought into the jury room. See Mattox v. United States, 146 U. S. 140 (1892);

(3) The correction of a mistake in the jury's uttered verdict. See, for example (although not a federal case), Spielter v. North German Lloyd Steamship Co., (1st Dept. 1931) 232 App. Div. 104.

Accordingly, it has been stated by the United States Supreme Court that:

(26) "* * * * let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. * * * " McDonald v. Pless, 238 U. S. 264, 267 (1915)

In Clark v. United States, 289 U. S. 1 (1933), Mr. Justice Cardozo stated:

"* * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. * * * " (p. 13)

In this case, even if we assume to consider the juror's letter, there is no indication of duress or intimidation. The juror joined in the verdict, apparently in the jury room before returning to the court room; she had ample opportunity when before the court to voice her dissent, but failed to do so.

In Allen v. United States, 164 U. S. 492 (1896), the United States Supreme Court, by Mr. Justice Brown, quoted with approval a (27) charge in which a court in a criminal case had said:

> "* * * although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows; yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. * * *" (p. 501)

A juror's change of mind, therefore, during deliberation is not unwarranted, nor is it a basis for a new trial.

The weight of authority, therefore, is against the defendant. See Jorgensen v. York Ice Machinery Corporation, 2 Cir., 1947, 160 F. 2d 432, 435 (opinion by Learned Hand, Circuit Judge); Rotondo v. Isthmian Steamship Co., 2 Cir., 1957, 243 F. 2d 581, 583; Jordon v. United

Exhibit A—Memorandum of District Court

States, D.C. Cir., 1936, 87 F. 2d 64, 67; Lancaster v. United States, 5 Cir., 1930, 39 F. 2d 30, 33; Wigmore on Evidence, 3rd Ed., Vol. VIII, §§ 2348-2349.

The motion for a new trial is denied.

So ordered.

Dated: New York, N. Y.
May 21, 1958.

RICHARD H. LEVET
United States District Judge

Exhibit B

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 98 and 99—October Term, 1958.

(Argued October 16, 1958 Decided November 18, 1958.)

Docket Nos. 25231-2

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. GIMECO,

Appellant.

Before:

HAND, HINCKS and WATERMAN,

Circuit Judges.

An appeal from orders of the District Court for the Southern District of New York (Levet, *J.* presiding), denying a motion for a new trial after conviction under an indictment for embezzlement and a motion to be relieved from a voluntary plea of guilty under another indictment.

JOHN J. SEFFEREN, *for the appellant.*

DONALD H. SHAW, *for the appellee.*

Exhibit B—Opinion of the United States Court of Appeals

PER CURIAM:

Grieco appeals from an order of the District Court for the Southern District of New York (Levet, *J.* presiding), denying a motion for a new trial after conviction under an indictment, charging him in eight counts with embezzlement from the mails and in a ninth count with conspiracy. After judgment upon this indictment he changed his plea of not guilty to a plea of guilty upon another indictment, charging him with making false statements in violation of §1001, of Title 18 U. S. C., and when he moved for a new trial upon the first indictment he joined with it a motion to restore his former plea of not guilty upon the second indictment. The ground alleged for a new trial upon the first indictment is that five days after the judgment had been entered, one of the jurors, a woman, wrote a letter to Judge Levet in which she declared that she had wished to vote for acquittal, but being the only juror who did, another juror, a man, was "very abusive," so much so that she was "shaking and crying" when she finally agreed to concur with the rest, and that she now wished "to retract." Judge Levet held a hearing at which both parties attended and he examined this juror, the upshot of whose testimony appears in the margin.[1] Judge Levet, having concluded

---

1 "* * * Well, right from the beginning, * * * no matter what I wanted to say, anything about any part of the case, it has nothing to do with the case. He kept shouting and yelling, not in just a loud tone of voice, but a very mean tone of voice. * * *

"* * * He wouldn't let me talk. Everything had nothing to do with the case. As soon as I wanted to say anything, he wouldn't let me talk about that. He just wouldn't let me talk about anything. He yelled that I have no commonsense. He pounded his

his examination, refused to allow the defendant's attorney to examine her, and denied the motion for a new trial.

As is well known, it was long the rule that a court would refuse to inquire in any way whatever as to what had

---

money on the table, you know, things like that. He was just yelling all through. * * *

"* * * In general he was yelling all the time. My mind—everytime—I couldn't collect my thoughts. He would stop me and I couldn't say what I wanted to say. * * *

"* * * He kept yelling all the time, 'That has nothing to do with the case,' and shouting, and mean, and he got excited. I don't know exactly by the word. He yelled I have no commonsense, when I wanted to bring some points out. He just wouldn't let me talk. * * *

"* * * [W]henever I had a thought to talk about, he just wouldn't let me talk about it. He just yelled. Finally, after about the fifth time * * * a lady said, 'let her talk.'

"* * * And whatever I had in mind at that time, I finished talking about. * * *

"* * * Just that one particular time.

"Q. Didn't you everytime eventually state what you wanted to say? A. No.

"* * * I did not get all those thoughts that I wanted to talk about, no.

"* * * I was very nervous and I was shaking and I was very upset, from the beginning. * * *

"* * * I was in no condition to give that verdict. I didn't even here (sic) what was going on near the end.

"* * * They were talking and I didn't know what they were talking about. * * *

"* * * I was practically in a daze. I don't know what I heard after a while.

"Q. You don't remember what you said? A. I don't even remember what the man was talking about to me when he was sitting next to me. * * *

"* * * I had chills. I was sick. I was upset. I had sickening feelings. * * *

"* * * [M]y heart kept pounding. I just had that pounding feeling and sinking feeling."

occurred during the jury's deliberations. It is true that the rigidity of this doctrine has been relaxed, as appears for example, in *Mattox* v. *United States*, 146 U. S. 140 (1892), where a newspaper article, prejudicial to the accused, was brought into the jury room. As was said in *McDonald* v. *Pless*, 238 U. S. 234, 268-69 (1915), "it would not be safe to lay down any inflexible rule because there might be instances in which" the "testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" And yet in that case the motion was denied, although the amount of the verdict had been the result of averaging the several amounts severally awarded by the jurors. We do not say that there can be no threats short of violence by one juror against a recalcitrant dissenter that will upset a verdict, but certainly there was nothing in the case at bar to justify such action. So far as appears, it was only the blustering arrogance of her fellow that so agitated the juror that, after she had later had time to reflect, she concluded that she had not voluntarily concurred in the verdict. In *Rotondo* v. *Isthmian Steamship Co.*, 243 Fed. (2) 581, 583 (1957), we said that it was "not indeed because the verdict would, or could, survive the facts if they were disclosed; but because the law will not permit a decision to be reopened to which all have assented." Again in *Jorgensen* v. *York Ice Machinery Corp.*, 160 Fed. (2) 432, 435 (1947), we said that "it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court." It is not possible to determine mental processes of jurors by the strict tests avail-

able in an experiment in physics; we have to deal with human beings, whose opinions are inevitably to some extent subject to emotional controls that are beyond any accessible scrutiny.

The appellant's motion to be allowed to withdraw his plea of guilty to the second indictment is too baseless to require discussion.

Orders affirmed.